Filed 10/28/20 De La Fuente v. Walmart CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FOUR

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| LAURA DE LA FUENTE,<br><br>Plaintiff and Appellant,<br><br>v.<br><br>WALMART INC.,<br><br>Defendant and Respondent. | B299185<br><br>Los Angeles County<br>Super. Ct. No. BC693710 |

APPEAL from a judgment of the Superior Court of Los Angeles County, Jon Takasugi, Judge. Affirmed.

David Azizi, for Plaintiff and Appellant.

Petit Kohn Ingrassia Lutz & Dolin, Jennifer N. Lutz, Andrew O. Smith, Brian P. Suba, for Defendant and Respondent.

## INTRODUCTION

After she slipped and fell on spilled coffee while shopping at a Walmart store, Laura De La Fuente sued Walmart Inc. for negligence and premises liability. Walmart moved for summary judgment, asserting it did not have actual or constructive knowledge of the spill. In opposition, De La Fuente argued Walmart was not entitled to summary judgment because triable issues of material fact existed with respect to when and how the spill occurred, and the reasonableness of both Walmart's safety inspection procedures and its failure to install slip-resistant flooring. She also requested a continuance under Code of Civil Procedure section 437c, subdivision (h),[1] claiming she needed additional time to discover facts essential to her opposition.

The trial court sustained Walmart's objections to De La Fuente's evidence, denied her request for a continuance, and granted summary judgment. Finding no error, we affirm.

## FACTS AND PROCEDURAL BACKGROUND

De La Fuente's complaint alleged that on September 6, 2017, she slipped and fell on a "slippery substance present on [the] shopping floor" at a Walmart department store located in Santa Fe Springs. The complaint further alleged Walmart knew or should have known about the substance's presence but failed to properly address it, and that Walmart "installed and/or maintained the subject dangerous condition."

Walmart moved for summary judgment, arguing De La Fuente's claims failed as a matter of law. Specifically, Walmart

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[1] All further undesignated statutory references are to the Code of Civil Procedure.

argued she could not prove it created the condition that caused her to fall (i.e., the wet floor), or that it had actual or constructive knowledge of the condition. In support of its arguments, Walmart heavily relied on video surveillance footage of the area where De La Fuente fell. According to Walmart, the video footage showed one of its employees inspecting the aisle where De La Fuente fell approximately six and one half minutes before the fall, a customer spilling coffee where the fall took place 3 minutes and 41 seconds before it happened, and no Walmart employees in the area in the time between the spill and the fall.

In opposition, De La Fuente contended the "unclear" video footage did not actually show a customer spilling coffee where she fell. Thus, she asserted, "a triable issue of material fact exists with respect to the source of the spill and when the spill was made." De La Fuente also argued there were triable issues of material fact regarding the reasonableness of Walmart's safety inspection procedures and its use of flooring that, "when wet . . . provides a significant likelihood that someone will slip and fall." Her arguments relied on the declaration of her expert witness, Brad Avrit.

In addition, De La Fuente requested a continuance under section 437c, subdivision (h), to discover facts essential to her opposition in the event the trial court was inclined to grant summary judgment. She contended she needed additional time to depose two witnesses: (1) Walmart's person most knowledgeable of its flooring material; and (2) Carlos Rico, the Walmart employee who submitted a declaration authenticating and interpreting the surveillance footage.

Along with its reply, Walmart submitted numerous evidentiary objections to Avrit's declaration.

The trial court sustained all of Walmart's objections and granted summary judgment. With respect to De La Fuente's first theory of liability – Walmart's alleged failure to discover and address the spill in a timely fashion – the trial court found Walmart demonstrated it did not have actual or constructive knowledge of the spill. The trial court agreed with De La Fuente that the surveillance video "is not particularly easy to see or discern." Notwithstanding the video, however, the trial court found two declarations satisfied Walmart's burden on the issue of knowledge: (1) the declaration of Evelia Virgen, the Walmart employee who inspected the area at issue 6 minutes and 30 seconds before De La Fuente fell and did not observe any spills; and (2) the declaration of Ana Hollandsworth, the Walmart employee who cleaned up the spill after De La Fuente fell and testified the coffee was still warm. The trial court determined these unrefuted declarations established the spill was not on the floor for a sufficient period of time to charge Walmart with constructive notice. Moreover, given Walmart's reliance on "the actual known amount of time between the spill and the accident to show lack of constructive notice," the trial court found the reasonableness of Walmart's actual inspection procedures was irrelevant.

The trial court rejected De La Fuente's second theory of liability – Walmart's alleged creation of an inherently dangerous condition by using flooring material that is unreasonably slippery when wet – on two grounds. First, the trial court noted the only evidence offered in support of the theory was Avrit's opinion on the matter, which the trial court ruled was inadmissible. Second, the court found the theory was unsupported by law, as De La Fuente did not cite, nor was the trial court aware of, any

"appellate authority holding that a store owner can be held liable for a slip on a spill, without notice of the spill itself, merely because the store owner chose the wrong composition of flooring." Because De La Fuente's second theory of liability failed as a matter of law, the trial court denied her request for a continuance to obtain information on Walmart's flooring selection.[2]

The trial court entered judgment in favor of Walmart. De La Fuente appeals from the judgment.

## DISCUSSION

### I. Standard of Review

"A party is entitled to summary judgment only if there is no triable issue of material fact and the party is entitled to judgment as a matter of law. (§ 437c, subd. (c).) A defendant moving for summary judgment must show that one or more elements of the plaintiff's cause of action cannot be established or that there is a complete defense. (*Id*., subd. (p)(2).) If the defendant meets this burden, the burden shifts to the plaintiff to present evidence creating a triable issue of material fact. (*Ibid*.) A triable issue of fact exists if the evidence would allow a reasonable trier of fact to find the fact in favor of the party opposing summary judgment. (*Aguilar v. Atlantic Richfield Co.* (2001) 25 Cal.4th 826, 850.)

"We review the trial court's ruling on a summary judgment motion de novo, liberally construe the evidence in favor of the party opposing the motion, and resolve all doubts concerning the evidence in favor of the opponent. (*Miller v. Department of*

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[2] The trial court sustained De La Fuente's objections to the portions of Rico's declaration interpreting the surveillance video. It therefore did not consider whether De La Fuente was entitled to a continuance to depose Rico.

*Corrections* (2005) 36 Cal.4th 446, 460.) We must affirm a summary judgment if it is correct on any of the grounds asserted in the trial court, regardless of the trial court's stated reasons. [Citation.]" (*Grebing v. 24 Hour Fitness USA, Inc*. (2015) 234 Cal.App.4th 631, 636-637.)

## II. Governing Legal Principles for Negligence and Premises Liability Claims in Slip-and-Fall Cases

"It is well established in California that although a store owner is not an insurer of the safety of its patrons, the owner does owe them a duty to exercise reasonable care in keeping the premises reasonably safe. [Citation.] In order to establish liability on a negligence theory, a plaintiff must prove duty, breach, causation and damages. [Citations.]" (*Ortega v. Kmart Corp*. (2001) 26 Cal.4th 1200, 1205 (*Ortega*).) "The elements of a cause of action for premises liability are the same as those for negligence . . . . [Citations.]" (*Castellon v. U.S. Bancorp* (2013) 220 Cal.App.4th 994, 998.)

"A store owner exercises ordinary care by making reasonable inspections of the portions of the premises open to customers, and the care required is commensurate with the risks involved. [Citation.]" (*Ortega*, *supra*, 26 Cal.4th at p. 1205.) "Because the [store] owner is not the insurer of the visitor's personal safety [citation], the owner's actual or constructive knowledge of the dangerous condition is key to establishing its liability." (*Id.* at p. 1206; see also *Moore v. Wal-Mart Stores, Inc.* (2003) 111 Cal.App.4th 472, 476 (*Moore*) ["In the absence of actual or constructive knowledge of the dangerous condition, the owner is not liable."].) Plaintiffs "need not show actual knowledge where evidence suggests that the dangerous condition was

present for a sufficient period of time to charge the owner with constructive knowledge of its existence. [Citation.]" (*Moore*, *supra*, 111 Cal.App.4th at p. 477.)

Where there is no direct evidence of the length of time the dangerous condition existed, "plaintiffs may demonstrate the storekeeper had constructive notice of the dangerous condition if they can show that the site had not been inspected within a reasonable period of time so that a person exercising due care would have discovered and corrected the hazard. [Citation.] In other words, if the plaintiffs can show an inspection was not made within a particular period of time prior to an accident, they may raise an inference the condition did exist long enough for the owner to have discovered it. [Citation.]" (*Ortega*, *supra*, 26 Cal.4th at pp. 1212-1213; *Moore*, *supra,* 111 Cal.App.4th at p. 477.)

Ordinarily, "[w]hether a dangerous condition has existed long enough for a reasonably prudent person to have discovered it is a question of fact for the jury[.]" (*Ortega*, *supra*, 26 Cal.4th at p. 1207.) However, where the evidence does not support a reasonable inference that the hazard existed long enough to be discovered in the exercise of reasonable care, the issue of knowledge may be resolved as a matter of law. (See *ibid.*)

## III. Walmart is Entitled to Summary Judgment

### A. Liability Based on Failure to Discover and Clean the Spill in a Timely Fashion

With respect to her first theory of liability, De La Fuente does not dispute Walmart lacked actual notice of the spill responsible for her fall. Rather, she contends the trial court erred by granting summary judgment because there were triable issues

of fact regarding whether Walmart had constructive knowledge. She raises two arguments in support of this position.

First, De La Fuente contends Walmart did not definitively establish the spill was present for a short period of time or that a proper inspection took place before the incident occurred. In particular, she asserts the declarations of Virgen and Hollandsworth – the evidence on which the trial court relied in finding Walmart met its burden on this issue – conflict with Walmart's video surveillance footage.[3] We do not agree with De La Fuente's argument.

In her declaration, Virgen states that at 12:12:02 p.m. on September 6, 2017, she "walked over the area of the incident," "zoned the area for spills and debris," and "did not see any substance on the floor." She further states she "would have taken immediate steps to remedy a spill if [she] had [seen] something on the floor." The surveillance video aligns with Virgen's statements: at the 12:12:02 p.m. time-stamp, the video depicts Virgen walking down the aisle where De La Fuente later fell. Consistent with her statement that she did not see anything on the ground, Virgen did not pause to address any spills.

Nevertheless, De La Fuente contends the video supports the inference that Virgen did not adequately inspect the area, and thus may have overlooked a spill present on the ground, because she walked through the aisle at a "brisk" pace. In support of this position, De La Fuente relies on Avrit's opinion that it would have been "difficult" for Virgen to "spot a spill"

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[3] The trial court overruled De La Fuente's objections to Virgen's and Hollandsworth's declarations. She does not challenge these rulings on appeal.

because she walked through "at a fast pace." As discussed in section III, *infra*, however, the trial court correctly excluded that evidence. Thus, De La Fuente's argument is wholly speculative. (See *Wascheck v. Department of Motor Vehicles* (1997) 59 Cal.App.4th 640, 647 ["'When opposition to a motion for summary judgment is based on inferences, those inferences must be reasonably deducible from evidence, and not such as are derived from speculation, conjecture, imagination, or guesswork.' [Citation.]"].)

Hollandsworth, in her declaration, states that while she was cleaning the coffee spill after De La Fuente slipped on it, she "noticed that it was still warm." De La Fuente correctly observes the video footage shows Hollandsworth using her feet to clean the spill with paper towels. Immediately thereafter, however, the video depicts Hollandsworth picking up the paper towels with her hands and placing them into the trash nearby. Consequently, the video does not, as De La Fuente contends, undermine Hollandsworth's statement that she was able to feel the temperature of the spilled coffee.

Next, De La Fuente argues Walmart failed to establish lack of constructive knowledge because it did not prove its safety inspection policy was reasonable. Again, we disagree.

A copy of Walmart's safety inspection policy is not included in the record. Excerpts of the transcripts of several Walmart employee's depositions, however, indicate Walmart requires its employees to inspect the area where they are located when instructed to do so over the store intercom. These "call-out[s]" for "safety sweeps" occur approximately every hour. De La Fuente complains that under this policy, areas of the store may go uninspected for lengthy periods of time because employees may

not be present or available to inspect certain areas when a "call-out" takes place.

But the reasonableness of Walmart's safety inspection policy is irrelevant to the issue of knowledge in this case. As discussed above, Walmart has shown an employee did, in fact, perform an inspection less than seven minutes before the slip-and-fall occurred. Under these circumstances, De La Fuente cannot rely on the claimed deficiencies in Walmart's policy to show "the site had not been inspected within a reasonable period of time" and thereby "raise an inference the condition did exist long enough for the owner to have discovered it." (*Ortega*, *supra*, 26 Cal.4th at pp. 1212-1213.) In other words, here, there is no connection between the alleged shortcomings in Walmart's inspection policy and its constructive knowledge of the spill.

In sum, Walmart's evidence demonstrates: (1) Virgen inspected the area at issue 6 minutes and 30 seconds before the incident occurred and saw no spills; and (2) when Hollandsworth cleaned up the spill moments after De La Fuente fell, she felt the coffee was still warm. The only reasonable inference to be drawn from this evidence is that the spill occurred in the minutes between Virgen's inspection and De La Fuente's fall. De La Fuente has submitted no admissible evidence to the contrary. Nor does she contend the time between the inspection and her injury was unreasonably long, and therefore sufficient to charge Walmart with constructive knowledge.

On this record, we conclude Walmart satisfied its burden to demonstrate it did not have constructive knowledge of the spill because the hazard did not exist long enough to be discovered in the course of reasonable care. The burden therefore shifted to De La Fuente to show a triable issue of material fact exists. (§ 437c,

subd. (p).) De La Fuente, however, failed to meet that burden. Therefore, summary judgment was properly granted in Walmart's favor on De La Fuente's first theory of liability.

### B. Liability Based on Use of Unreasonably Slippery Flooring and Failure to Install Slip-Resistant Flooring

De La Fuente contends the trial court erred by refusing to consider whether Walmart was negligent based on its use of unreasonably slippery flooring and failure to install slip-resistant flooring. We disagree. For the reasons set forth below, we conclude the trial court correctly rejected De La Fuente's second theory of liability.

At the outset, we note De La Fuente relies entirely on Avrit's opinions to establish Walmart's floors are unreasonably slippery when wet, such that Walmart fell below the standard of care by failing to install slip-resistant flooring. As discussed in the next section of this opinion, however, the trial court properly excluded the portions of Avrit's declaration on this point.

More important, in *Ortega*, our Supreme Court clearly defined the scope of a store owner's duty to protect its patrons from slipping and falling due to dangerous conditions. The Supreme Court stated "[store] owner[s] . . . owe [their patrons] a duty to exercise reasonable care in keeping the premises reasonably safe. [Citation.]" (*Ortega*, 26 Cal.4th at p. 1205.) Store owners discharge this duty "by making reasonable inspections of the portions of the premises open to customers" to discover and remedy hazardous conditions, such as spills, in a timely fashion. (*Ibid.*) De La Fuente has not cited – nor were we able to find – any authority requiring store owners to conduct reasonable

inspections *and* install slip-proof flooring to prevent injury. In addition, De La Fuente has not submitted any evidence demonstrating there is a building code or industry standard requiring installation of slip-proof flooring in grocery stores.[4]

In any event, even if Walmart could be liable based on its choice of flooring, De La Fuente must still prove Walmart had actual or constructive knowledge of the dangerous condition responsible for her injury to succeed on her claims. (*Ortega*, *supra*, 26 Cal.4th at p. 1206; *Moore*, *supra*, 111 Cal.App.4th at p. 479 ["[U]nder current California law, a store owner's choice of a particular 'mode of operation' does not eliminate a slip-and-fall plaintiff's burden of proving the owner had knowledge of the dangerous condition that caused the accident."].) De La Fuente does not assert Walmart's floor is hazardous when it is dry. Rather, her theory is that the floor becomes unreasonably slippery – and therefore constitutes a dangerous condition – only when it is wet. Accordingly, pursuant to *Ortega* and *Moore*, De La Fuente must establish Walmart had actual or constructive knowledge of the fact that the floor was wet where she fell before she was injured. (*Ortega*, *supra*, 26 Cal.4th at p. 1206; *Moore*, *supra,* 111 Cal.App.4th at p. 479.)

As discussed above, however, De La Fuente does not dispute Walmart lacked actual knowledge that the floor was wet. And, Walmart's unrefuted evidence demonstrates it did not have constructive knowledge of the condition; it showed an employee

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[4] We note Avrit's declaration states "slip-resistant vinyl floor is commonly installed within grocery stores in Southern California[.]" Even assuming the statement is admissible and correct, it does not establish the existence of a standard practice across the grocery store industry to install slip-proof flooring.

conducted an inspection less than seven minutes before the incident occurred and that employee did not see any liquid on the floor.

Accordingly, we conclude the trial court correctly granted summary judgment in favor of Walmart on De La Fuente's second theory of liability.

## III. Walmart's Objections to Avrit's Declaration

De La Fuente contends the trial court erred by excluding portions of Avrit's declaration because: (1) the court improperly issued a "'blanket' ruling" sustaining all of Walmart's objections; and (2) none of the objections were meritorious.

Our Supreme Court has not resolved the standard of review for summary judgment evidentiary rulings (see *Reid v. Google., Inc.* (2010) 50 Cal.4th 512, 535), but "[a]ccording to the weight of authority, appellate courts 'review the trial court's evidentiary rulings on summary judgment for abuse of discretion. [Citations.] . . . ' [Citations.]" (*Serri v. Santa Clara University* (2014) 226 Cal.App.4th 830, 852.) We find no error under either a de novo or abuse of discretion standard.

In arguing the trial court abused its discretion by sustaining Walmart's objections "without any explanation," De La Fuente relies on *Nazir v. United Airlines, Inc.* (2009) 178 Cal.App.4th 243 (*Nazir*), and *Twenty-Nine Palms Enters. Corp. v. Bardos* (2012) 210 Cal.App.4th 1435 (*Palms*). These cases, however, are distinguishable from the present case.

In *Nazir*, the defendants raised 764 objections set forth in 324 pages to the plaintiff's evidence. (*Nazir*, *supra*, 178 Cal.App.4th at p. 254.) The trial court sustained all but one of the defendants' objections. (*Id.* at 255.) The Court of Appeal reversed,

explaining "there is no way that the trial court could properly have sustained 763 objections ""guided and controlled . . . by fixed legal principles."" [Citation.]" (*Ibid.*) The *Nazir* court set forth several reasons for its conclusion: (1) some of the sustained objections did not assert any basis for the objection; (2) many of the objections were patently frivolous and obviously meritless (e.g., the defendants objected to the plaintiff's testimony concerning his religion, skin color, and national origin); (3) twenty-seven of the sustained objections were to the plaintiff's brief rather than his evidence; and (4) over 250 of the sustained objections failed to quote the evidence objected to. (*Id.* at pp. 255-256.) Under these circumstances, the *Nazir* court held "the trial court's order sustaining all but one of [the] defendants' objections was a manifest abuse of discretion." (*Id.* at p. 257.)

In *Palms*, the Court of Appeal held "the trial court erred by summarily sustaining all of [the plaintiff's] 39 evidentiary objections because some of the objections were unreasonable and it appears the trial court did not consider the individual objections." (*Palms*, *supra*, 210 Cal.App.4th at p. 1447.) In support of its holding, the *Palms* court emphasized the objections spanned 48 pages and were "sweeping [in] nature," and that many of the objections were clearly meritless. (*Id.* at p. 1449.)

By contrast, far fewer objections were asserted in the present case. Walmart raised 12 objections across 13 pages to various portions of Avrit's declaration. Unlike in *Nazir*, Walmart's objections were all in proper form; each objection identified the portion of Avrit's declaration being challenged and set forth the grounds upon which it was based. Additionally, as discussed below, Walmart's objections were not patently frivolous or meritless as in *Nazir* and *Palms*. Far from it.

Walmart objected to Avrit's opinions on three topics: (1) Walmart's flooring; (2) the visibility of spills on the ground in the area at issue; and (3) Walmart's safety inspection practices. We address the admissibility of Avrit's opinions regarding each topic in turn.

First, Avrit states the flooring used in the Walmart store at issue is unreasonably slippery when wet; therefore, Walmart fell below the standard of care by failing to install slip-proof flooring. This opinion was properly excluded because it lacks evidentiary support. (*Bushling v. Fremont Medical Center* (2004) 117 Cal.App.4th 493, 510 (*Bushling*) [expert opinions "may not be based on assumptions of fact that are without evidentiary support"].) While Avrit states his consulting company "inspected" Walmart's flooring and took "various photographs," he does not state the floor was in fact tested for slipperiness.

Next, relying on Walmart's surveillance footage, Avrit states it would have been "difficult" for Virgen to "spot a spill on the subject area" because she walked through at a "fast pace." Avrit, however, provides no reasoned explanation to support this conclusion. He also opines that spills on Walmart's floor "would be relatively difficult for a pedestrian to perceive" because customers are often distracted by merchandise displays and advertisements. On this point, Avrit's opinion is wholly speculative and unsupported by any evidence concerning customer behavior. Thus, the trial court correctly sustained Walmart's objections to these opinions. (*Bushling*, *supra*, 117 Cal.App.4th at p. 510 [expert opinions have "no evidentiary value" when "based on factors that are speculative or conjectural" or "rendered without a reasoned explanation of why the underlying facts lead to the ultimate conclusion"].) Moreover

whether a customer could easily spot the spill is not relevant to whether Walmart had constructive notice.

Lastly, Avrit opines Walmart's safety inspection procedures are "highly dangerous" and "completely inadequate." This opinion was properly excluded because it is irrelevant. (Evid. Code, § 210.) For the reasons noted above, there is no connection between the asserted shortcomings in Walmart's safety inspection procedures and whether it had constructive knowledge of the spill.

Accordingly, we conclude the trial court did not err by sustaining Walmart's objections to Avrit's declaration.

## IV. De La Fuente's Request for Continuance

Section 437c, subdivision (h) provides: "If it appears from the affidavits submitted in opposition to a motion for summary judgment . . . that facts essential to justify opposition may exist, but cannot, for reasons stated, be presented, the court shall . . . order a continuance to permit . . . discovery to be had[.]" "The . . . party seeking a continuance 'must show: (1) the facts to be obtained are essential to opposing the motion; (2) there is reason to believe such facts may exist; and (3) the reasons why additional time is needed to obtain these facts. [Citations.]' [Citation.]" (*Frazee v. Seely* (2002) 95 Cal.App.4th 627, 633, emphasis omitted.) While the decision to grant a continuance is "normally a matter within the broad discretion of trial courts," a continuance is "virtually mandated" where a party makes the requisite showing above. (*Bahl v. Bank of America* (2001) 89 Cal.App.4th 389, 395.)

De La Fuente contends the trial court erred by denying her request for a continuance under section 437c, subdivision (h). She

maintains that despite multiple requests by her counsel, Walmart did not produce two deponents she contends may have facts essential to opposing summary judgment: (1) Rico, the Walmart employee who submitted a declaration authenticating and interpreting Walmart's video surveillance footage; and (2) Walmart's person most knowledgeable of its flooring material. We are not persuaded by her argument.

With respect to Rico, the trial court sustained De La Fuente's objections to the portions of his declaration interpreting the surveillance footage. Consequently, questioning Rico on this topic would not yield any information helpful to opposing Walmart's motion. Moreover, De La Fuente has not explained why information concerning the surveillance footage's authenticity is necessary to oppose summary judgment. Indeed, De La Fuente does not appear to dispute the video's authenticity for purposes of opposing Walmart's motion, as she relied on the video herself to argue there were triable issues of fact.

Likewise, the deposition of Walmart's person most knowledgeable of its flooring choice would not give rise to any facts helpful, let alone essential, to opposing summary judgment. As discussed above, even assuming Walmart's floors are unreasonably slippery when wet, De La Fuente must still show Walmart had actual or constructive knowledge of the fact that the floor was wet to survive summary judgment. Walmart, however, has demonstrated De La Fuente cannot carry her burden on this issue.

Accordingly, the trial court correctly concluded De La Fuente failed to demonstrate entitlement to a continuance under section 437c, subdivision (h).

## DISPOSITION

The judgment is affirmed. Walmart is awarded its costs on appeal.

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CURREY, J.

We concur:

WILLHITE, Acting P.J.

COLLINS, J.